

Saltwater, Inc. and Alaska Fishermen's Union, Division of UIW, SIUNA, AFL-CIO, Petitioner.
Case 19-RC-13412

September 10, 1997

DECISION AND ORDER DENYING REVIEW

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On June 25, 1997, the Acting Regional Director for Region 19 of the National Labor Relations Board issued a Decision and Direction of Election in the above-captioned proceeding (relevant portions of which are attached as an appendix) in which she found appropriate the petitioned-for unit of the Employer's groundfish and shellfish observers. In determining voting eligibility, the Acting Regional Director found eligible those observers who either met the standard Board eligibility criteria¹ or worked for the Employer for 30 or more days during the 12 months preceding the eligibility date. The Acting Regional Director directed that the election be conducted during the August combined seasonal fishing peak rather than the greater seasonal peak next January. The Employer filed a timely request for review of the Acting Regional Director's decision. Having carefully considered the issues raised, the Board denies the Employer's request for review for the reasons set forth below.

In nontraditional industries, such as the instant fishing observer industry, the Board has permitted the utilization of eligibility formulas which take into account the peculiarities of employment in that industry. Here, the Acting Regional Director devised a formula under which the Employer's observers would be eligible if they either met the standard Board eligibility criteria or worked for the Employer for 30 or more days during the 12 months preceding the eligibility date. The Employer contends that the Acting Regional Director applied the Board's current construction industry eligibility formula (*Steiny & Co.*, 308 NLRB 1323 (1992)) and erred in doing so. We think that the Employer misunderstood the Acting Regional Director's basis for devising the instant formula and we find that the Acting Regional Director's formula is reasonable.

The Acting Regional Director did not cite *Steiny* or other construction industry cases as the basis for her decision, and did not include the 45-day/2-year alternative set forth in *Steiny*. In explaining the eligibility formula she had found appropriate, the Acting Regional Director did note that (like workers in the construction industry) a fair percentage of fishing industry observers work for one employer for some periods and

for the employer's competitors at other times. However, the Acting Regional Director also considered several other factors specific to the employment patterns of observers in the fishing industry in devising the formula. The Acting Regional Director clearly stated that she utilized the 30-day formula in recognition of record evidence which showed that some observers have employment contracts of approximately 30 days in duration and that these employees, like those whose contracts are of longer duration, retain hiring preference with the Employer (and indeed are actively sought out by the Employer for reemployment if they do not call themselves) and have a pattern of recurring employment with the Employer. Thus, we reject the Employer's suggestion that the Acting Regional Director has misapplied a formula devised for the construction industry to an industry with different characteristics.

The Employer also asserts, relying on its allegation of high turnover of observers in the industry, that the Acting Regional Director's formula allows voting by observers who no longer have a continuing interest in employment in the industry while excluding new observers who will be employed in the August season. The Employer, however, has not effectively refuted the Acting Regional Director's finding that the record does not establish that observers leave the industry after completing their contracts with the Employer. It is undisputed that at least some observers go back and forth between fishing observer companies. In addition, there is a continued likelihood that a substantial percentage of the Employer's observers found eligible based on the 30-day criteria will be working for the Employer again during the coming seasons. Indeed, the Employer itself suggests that up to 60 percent of eligible observers will return to work for the Employer. We note that in true seasonal cases, the Board has included seasonals whose return rate is in the 30-percent range. See, e.g., *Kelly Bros. Nurseries*, 140 NLRB 82, 85 (1962). Further, there is no assurance under any method of determining eligibility that the employees found eligible to vote will continue to work for the Employer for any significant period of time. That eligible workers who may not have a continuing interest in working for the Employer may vote to determine the representation rights of future employees does not require rejection of the Acting Regional Director's formula. See *Steiny & Co.*, supra at 1325-1326.

As to any newly hired observers, even under standard eligibility criteria, new employees of any employer may not meet eligibility requirements for voting because they were not employed during the payroll period prior to the Decision and Direction of Election. We do not see how moving to a January election, as urged by the Employer, would increase the voting par-

¹ The Board finds employees eligible to vote if they were employed during the payroll period ending immediately prior to the Decision and Direction of Election and who worked on the election day.

ticipation of new observers; rather, it simply would enfranchise and/or disenfranchise different individuals.

The Petitioner sought an immediate election. The Employer sought an election in August if the Acting Regional Director limited the unit to groundfish observers (peak season for groundfish) and in January if the Acting Regional Director combined the groundfish and shellfish observers (peak combined season). The Acting Regional Director combined the observers² and directed an election in August (the second highest combined peak season).³ We find that the Acting Regional Director's decision is reasonable.

Both the Acting Regional Director and the Employer treat the Employer's operation as if it were seasonal. Where an employer's operation has been shown to be seasonal, the Board will generally direct an election at or near the peak season. *Libby McNeill & Libby*, 90 NLRB 279, 281 (1950). Where employers have a series of seasonal peaks, the Board will consider such factors as the advantage of an early election and the desirability of enabling the largest number of employees to vote. *Elsa Canning Co.*, 154 NLRB 1810, 1812 (1965). The Employer's business has nonseasonal aspects in that it operates yearround with a substantial complement of employees (a monthly minimum of about 26 employees to a monthly maximum of 85) and the "up" period is of a relatively longer duration than the "down" period—there are 7 peak months and only 3 "down" months. Finally, the Employer's business has seasonal aspects in that most observers meet requirements just for the groundfish or shellfish work and work only during their respective seasons, and they work varying numbers of contracts and lengths of time during their season. The only year-round employees appear to be administrative employees and are not in the requested unit.

Irrespective of the precise label to be placed on the character of the Employer's operation, we find that the Acting Regional Director's selection of an August/September balloting period is a reasonable method of balancing the goals of holding a prompt election while also enfranchising the greatest number of eligible employees, particularly given the Acting Regional Director's use of an alternative eligibility formula. *Dick Kelchner Excavating Co.*, 236 NLRB 1414 (1978), in which the Board delayed the election until the employer's peak season, is distinguishable. In that case, the Board found that the employer's business was seasonal in nature and that the work force was substantially greater in the employer's sole peak season than

the off season. Here, even if the Employer is viewed as a seasonal employer, there is more than one peak season, the difference in employee complement between the two peak seasons is not substantial, and the eligibility pool is not limited to employees working in the August peak season.

ORDER

The Employer's request for review is denied.

APPENDIX

DECISION AND DIRECTION OF ELECTION

The Employer is engaged in the provision of observers for the groundfish and shellfish industry in Alaskan waters, pursuant to governmental regulation of commercial fishing activity. Its headquarters is situated in Anchorage and it maintains a satellite office in Kodiak, Alaska, while the observers are deployed on vessels operating in the Bering Sea and Gulf of Alaska, as well as in some processing plants on shore. The Petitioner seeks a unit of groundfish and shellfish observers, whose voting eligibility, it argues, should be determined using a formula such as that found in *Steiny & Co.*, 308 NLRB 1323 (1992). Additionally, it seeks a mail ballot election due to the vast distances and unusual scheduling of observers. The Employer contends that a unit limited to groundfish observers is appropriate. It seeks a manual election and argues that voting eligibility should be determined using seasonal industry criteria. There is no history of collective bargaining.

The Employer's president is Nancy Munro, its vice president of operations is Debbie Hicks, and its observer coordinator is Kathy Robinson. It is Robinson who recruits and interviews applicants for observer positions, arranges for their training and housing in Anchorage² during the training period, she handles any emergencies that may arise, and deals with clients concerning the use of observers. The clients are owners of commercial fishing vessels or processing plants who, according to law, must have observers on site to monitor fishing activities and collect biological data, with an eye to conserving the resource. It is the National Marine Fisheries Service (NMFS) that governs the harvesting of groundfish, while the shellfish species are monitored by the Alaska Dept. of Fish and Game (ADFG). Training of observers is done by these agencies, not the Employer. The Employer may deploy only observers who have passed certification exams administered by the government agencies and whose work performance during past employment periods has been satisfactory to them. Observers work under contracts issued by the Employer, and the duration of each contract varies according to species being harvested and length of open season for such species. Assignments could be as brief as 1 month or as long as 3 months.

Hiring requirements are set by the NMFS and ADFG, and it is those agencies who approve applicants for hire and training. Applicants for the position of groundfish observer must possess a BS degree in fisheries, natural resource man-

² The Petitioner did not request review.

³ As a result of government regulations limiting the groundfish and shellfish seasons, there are 2 combined peak observer seasons: the highest from January through April, averaging the Employer's employment of 76 observers per month, and a second from August through October, averaging 66–67 observers per month.

² Observers come from all over the United States. The Employer recruits through universities, environmental organizations, and on the Internet.

agement, wildlife biology, or zoology. Shellfish observers also must possess a BS biology degree but it can have been awarded in a wider range of fields: Unlike the groundfish observers, shellfish observers must also have an FCC license, inasmuch as they transmit the data collected in the field via radio, while their groundfish counterparts utilize telex or fax. The training they all must undergo in order to gain certification includes species identification, an overview of the fishery and the sponsoring agency, safety, and data forms. Groundfish observers' training takes 3 weeks and shellfish observers takes several days less.

The conditions under which both groundfish and shellfish observers live are substantially the same. Thus, it is normal for there to be only one observer per vessel.³ The working atmosphere in which that individual works is less than collegial in that it is the observer's function to conserve the species, as opposed to the vessel employees' function of harvesting it in the greatest possible quantities. The work is physically demanding, noted for its long hours and exposure to harsh weather. The few observers who are assigned to shore plants perhaps have an easier life, but the record does not show life and work in a groundfish plant to be easier or harder than that in a shellfish plant.

The Employer provides housing during training. This housing, the pay scales,⁴ and fringe benefits⁵ are substantially the same for both groups of employees. There is some difference in standby pay between them. This is pay given for the few days observers must wait to be debriefed by their respective government agency at the end of a contract. The record gives varying figures of pay for the groups, and I am unable to discern exactly what the amount of difference is or which group is paid more.

The duration of employment contracts is dependent on the fishery to which the individual observer is deployed. Fishing seasons are established by the NMFS and ADFG and vary from year to year. Thus, a groundfish observer assigned to the pollock season could expect to work much of the two periods annually that season is open. He may also have chosen to receive training on shellfish as well and, in that case, is able to remain employed at times when shellfish harvesting is allowed but groundfish harvesting may be curtailed. An estimated 10 of the Employer's observers who worked during the last fiscal year are so cross-trained.

The Employer prefers to hire observers who have worked for it in the past.⁶ It maintains a list of such individuals and notifies them of openings. When this results in an insufficient number of observers to meet governmental needs, it re-

cruits new applicants. There are five employers in this business in Alaskan waters, and observers at times change employers. When such an individual seeks employment with the Employer, the Employer must contact the applicable government agency to determine whether it gave that individual a favorable evaluation at the end of his last contract and—whether certification is valid. If hired, the observer undergoes a 2-day briefing by the agency in lieu of having to repeat the full training period prior to deployment to a fishery. The record is silent concerning whether the Employer may or does refuse to hire individuals who meet government agency standards but who, for whatever reason, the Employer does not want to employ. While no testimony was taken, employment contracts entered into evidence show that it is the Employer who has sole discretion to terminate employees.⁷

In general, it may be said that groundfish seasons are busiest from January to March and again from July to September. The Employer asserts that on July 21 and August 4 and 18 it can guarantee that all new groundfish observers would be in Anchorage and, thus, could vote there in a manual election. A schedule prepared by the NMFS, however, lists a number of 2- and 4-day briefings for certified groundfish observers during July, August, and September which do not coincide with the above three dates. The Employer also asserts that observers deployed on vessels during this 3-month period would have opportunity to visit either Anchorage, Kodiak or Dutch Harbor, Alaska, repeatedly as vessels come in to offload cargo and take on supplies. However, no two vessels can be counted on to be in port on the same day as their trips to port are occasioned by individual vessel requirements. The record does not reveal whether the estimated 5–10 shore processing plants with whom the Employer contracts are for groundfish or shellfish or both. Nor does it list the locations of such plants. Shellfish fisheries share the January–March peak season with groundfish fisheries, but their later season occurs about November–December. Shellfish seasons tend to be shorter in duration, lasting a month or two, while groundfish seasons last 2 to 3 months in general.

Conclusions

The groundfish and shellfish observers share in common a number of factors, including: advanced educational requirements for hire; living and working conditions that can be physically difficult; employment periods limited to seasons whose openings and durations are set by governmental bodies and which are outside the control of the Employer or employee; working in remote sites; similar training, both as to nature and duration; the same mode of payment and similar wage scales; identical fringe benefits; and the requirement that they submit to client-mandated drug tests and government-mandated certification. Working hours are governed by the fishery. Both work independently of direct Employer oversight. Whatever supervision the Employer provides appears to be in the person of observer coordinator Kathy Robinson, who coordinates the activities of both groups. Individual observers may undergo cross-training which allows them to work in both fields. The basic function

³ A few designated CDQ vessels must have two observers in order that there may always be one on duty actively watching the fish being caught. While CDQ designation is species specific, the record did not reveal which species were covered by this requirement.

⁴ Employees are paid by the day.

⁵ The insurance costs for coverage for shellfish observers is higher than that for groundfish observers. However, the record does not indicate whether this is paid for by the Employer or employee.

⁶ Approximately 35 percent of the groundfish observers work for one or two contracts; 20 percent for three to five contracts; and 10 percent for five or more contracts. The remainder are new observers. No similar figures were provided for shellfish observers. However, a general statement concerning turnover was entered, and to the effect that turnover rate about 60 percent. Former observers who do not actively contact the Employer about future employment are contacted by the Employer for that purpose.

⁷ However, an employment contract is null and void by its terms should an observer fail a drug test mandated by a vessel owner or should the observer lose his agency certification.

of both groups is the same—to provide the overseeing governmental body biological data for conservation utilization. Few factors separate the two groups. Thus, for example, shellfish seasons tend to be shorter in duration, and so the activity is more intense while seasons are open.

That the two groups share a strong community of interest is self-evident. Common skills, education, function, remoteness of their worksites, identical fringe benefits, and a similar daily pay scale are clear indications of that community of interest. *Phoenician*, 308 NLRB 826 (1992); *Cheney Bigelow Wire Works*, 197 NLRB 1279 (1972). Further, it is only necessary that a unit be an appropriate unit, not the only or most appropriate unit. *Morand Bros. Beverage Co.*, 91 NLRB 409 (1950), *enfd.* 190 F.2d 576 (7th Cir. 1951). Accordingly and, in view of the record as a whole, I find that the appropriate unit consists of groundfish and shellfish observers.

The Petitioner maintains that an election conducted by mail ballot is necessary to ensure the participation of all unit employees, while the Employer contends only a manual election is appropriate. Additionally, the Petitioner seeks an immediate election, while the Employer urges waiting until the late summer peak if the appropriate unit consists only of groundfish observers or until January 1998 if it includes shellfish observers as well. As to the first issue, the unit employees are scattered over thousands of miles of ocean in vessels and at various processing plants along the shore. Should a manual election with no voting formula be conducted the participation of employees who regularly work for the Employer but who were not currently under contract would be jeopardized. Other individuals in the Employer's employ but already deployed to a fishery might have occasion to visit port, but which port and exactly when any vessel would put in is impossible to say in advance. Therefore, trying to schedule a manual election date and site for them would be impossible. Moreover, attempting to conduct a manual election under these circumstances would be so costly as to be prohibitive in these days of scarce government resources. In view of all the foregoing, I shall order that the election be conducted by mail ballot.

On brief the Employer argues that an election must be conducted at a January 1998 seasonal peak.⁸ However, a

⁸ During the hearing the Employer argued for an August 1997 election. However, on brief it contended January 1998 was the appropriate time should the unit include both groups of observers. As

somewhat smaller peak of overall employment occurs in August, which could be used for scheduling a mail-ballot election with a voting formula that would allow for the inclusion of those employees not currently under contract (such as some shellfish observers). Inasmuch as the record reveals that a fair percentage of observers work for the Employer some periods and for its competitors at other times, much like the situation in construction, and that the Employer recalls individuals who have worked for it in the past, I find that those eligible to vote are those employed during the payroll period ending immediately prior to the date of this decision and on the election day as well as those who worked for the Employer for 30 or more days during the 12 months preceding the eligibility date.⁹ I shall utilize this formula in recognition of record evidence showing some observer contracts to be approximately 30 days in duration and that these employees, like those whose contracts are of longer duration, retain hiring preference by the Employer and have a pattern of recurring employment with the Employer. Such patterns demonstrate their legitimate interest in helping determine whether the unit should be represented by a labor organization for purposes of collective bargaining. Further, scheduling a mail-ballot election in August using the foregoing formula serves to balance the interest of conducting an election as quickly as possible with that of allowing the greatest possible participation of employees. Accordingly, I shall order the mail-ballot election to take place in August.

There are approximately 125 employees in the appropriate unit.

I am including shellfish and groundfish observers in the unit. I shall address the January 1998 argument.

⁹ The Employer argues against such a formula, noting the turnover rate of employees, and contending that this distinguishes the Employer's hiring pattern from that seen in the construction industry. It argues on brief that those of the Employer's observers who work for no more than one contract leave the industry altogether and return home to seek work of another sort. In fact, the record does not show that to be the case. It shows only that the turnover rate is at a certain level, not that observers leave the industry. Indeed, reference is made on the record of observers working for the Employer's competitors and, likewise, competitors' observers coming to work for the Employer. I find the record inconclusive as to the destiny of observers leaving the Employer's employ. Thus, contrary to the Employer's assertion, I find record evidence not to support its contention that the voting formula I have devised not to be appropriate.